STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2012
v	No. 302206 Mecosta Circuit Court
PATRICK DEAN STILES, Defendant-Appellant.	LC No. 10-006877-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals by right his convictions after a jury trial of larceny from a motor vehicle, MCL 750.356(a)(1), and receiving or concealing stolen property valued at $1,000 but less than $20,000, MCL 750.535(3)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 762.12, to concurrent terms of 36 months to 20 years for larceny from a motor vehicle and 46 months to 20 years for receiving or concealing stolen property. We affirm.

Before trial, the prosecution filed a notice of intent to introduce other acts evidence to show intent, lack of mistake or accident, and that the charged act was part of a common plan or scheme. Defendant moved to exclude the other acts evidence. The trial court ruled that the other acts evidence related to theft from a motor vehicle was admissible to "rebut any claims of accidental or innocent possession of the stolen tires and rims."

At trial, Roger Martin testified that he noticed the new low-profile street tires and custom painted wheels on his Dodge Avenger were missing. He found the missing tires at Brandie Finkbeiner's residence. One tire was on defendant's Jeep Cherokee, one was in the rear hatch of the Jeep, and the other two were under a blanket by the door of the residence. Finkbeiner told the police that defendant stole the tires. The police told defendant that there was a stolen tire on his car, but did not tell him that four tires had been found. Defendant explained he had just bought a spare tire and that children were stealing tires and leaving them in the yard.

Chief Steven DeWitt of the Howard City Police testified that in 2003 he investigated several incidents involving defendant's stealing property from motor vehicles. Two individuals who were involved in the 2003 thefts testified about defendant's involvement in the thefts. Additionally, several witnesses testified about property stolen from their vehicles in 2003. The testimony established that defendant typically stole the property from motor vehicles at night with the aid of an accomplice. Generally the vehicles were in residential areas that were within

walking distance of defendant's residence. The stolen property was typically divided between defendant and his accomplices and was sometimes moved using the White Pines trail.

On redirect examination, DeWitt testified that there were 52 prior police reports connected with defendant. Defense counsel objected on the ground that the reference violated the court's order limiting the scope of other acts evidence, but the trial court ruled that defense counsel had opened the door to the testimony during his cross-examination.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A court abuses its discretion when it chooses a result outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In this case, the prosecution sought to introduce other acts evidence to show intent, absence of mistake or accident, and the existence of a common plan or scheme. These are proper reasons specifically included in MRE 404(b).

However, mechanical recitation of an enumerated reason, without more, is "insufficient to justify admission" of the other acts evidence. *Crawford*, 458 Mich at 387. Instead, the prosecution must explain how the other acts evidence is relevant. *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). Relevance under MRE 401 has two elements: materiality (whether a fact is of consequence to the action), and probative force (the tendency to make the fact more or less probable). *Crawford*, 458 Mich at 388-389. Evidence has sufficient probative force if it has any tendency to prove a fact at issue. *People v Starr*, 457 Mich 490, 497-498; 577 NW2d 673 (1998). Evidence is material if it goes to a fact that is truly at issue or consequential to the action. *Id*. at 497; *McGhee*, 268 Mich App at 610. Because the purposes listed in MRE 404(b) (1) are not intrinsically relevant, a trial court must closely scrutinize whether proposed other acts evidence is logically relevant to a proper, non-character purpose. *Crawford*, 458 Mich at 387-388.

Here, the other acts evidence was relevant to intent and absence of mistake or accident.

"Evidence of intent is relevant because it negates the reasonable assumption that the incident was an accident." *McGhee*, 268 Mich App at 611. "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant's act is intentional." *Id.* (internal citation omitted). When defendant was advised that there was a stolen tire on his Jeep, he claimed that he had just bought a tire and that local children were stealing tires and bringing them into his yard. This assertion clearly implies that defendant either did not know the tires and wheels were stolen or that he innocently, accidentally, or mistakenly came into possession of them. Whether defendant possessed the tires and wheels innocently was a material issue for the jury to determine. The other acts were also probative as to defendant's knowledge of whether the tires and wheels were stolen. When a defendant enters a not guilty plea, all the elements of the criminal offense are at issue. *Crawford*, 458 Mich at 389. Defendant was charged with receiving or concealing stolen property. An element of that offense is actual or constructive knowledge that the property received or concealed was stolen. *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002). Thus, how defendant came into possession of the tires was important, and, in light of his claim that either he purchased the tire or that neighborhood children were bringing stolen tires to him, other acts evidence to rebut the claims was relevant.

Additionally, whether there was a common plan or scheme was relevant in this case. The existence of a common plan or scheme is a "proper, non-character purpose for presenting evidence of a defendant's other acts." *People v Pattison*, 276 Mich App 613, 616; 741 NW2d 558 (2007). Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *People v Dobek*, 274 Mich App 58, 90; 732 NW2d 546 (2007). A general similarity between the charged and uncharged acts does not alone establish a plan, scheme, or system used to commit the acts, but logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing plan. *Id*. Moreover, common plan evidence may be relevant to prove that the charged offense was committed. *VanderVliet*, 444 Mich at 71.

The prosecution alleged and the testimony established that defendant had previously stolen property from motor vehicles at night, that he committed the thefts with a partner, that he divided the stolen property with his partner, that he used the White Pine Trail to move the stolen property, and that all the thefts were in the area surrounding his residence. The dissimilarities between the charged and uncharged conduct were insignificant and primarily related to the location of the vehicles. A trial court's decision on a close evidentiary issue is not an abuse of discretion. *McGhee*, 268 Mich App at 614.

A trial court must also determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. MRE 403. We must recognize that the trial court is best situated to make this determination because of its contemporaneous ability to assess the presentation, credibility and effect of the testimony. MCR 2.613(C); *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002). Keeping in mind that all relevant evidence is prejudicial, proffered evidence is unfairly prejudicial only if it has marginal probative value that will be given undue or preemptive weight by the jury. *Crawford*, 458 Mich at 398; *McGhee*, 268 Mich App at 613-614.

Furthermore, limiting instructions can protect a defendant's right to a fair trial. *Magyar*, 250 Mich App at 416. Here, the trial court twice instructed the jury about the proper purpose for the other acts evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, the trial court's instructions alleviated any danger of unfair prejudice and protected defendant's right to a fair trial.

Finally, we need not decide whether the trial court abused its discretion permitting testimony regarding 52 police reports. A preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This Court must "focus[] on the nature of the error and assess[] its effect in light of the weight and strength of the untainted evidence." *Id.* at 495. Here, the one-time reference to 52 prior reports connected to defendant must be weighed against all properly admitted evidence implicating defendant, including the properly admitted other acts evidence, the tires in defendant's possession approximately 24 hours after they were stolen, and defendant's incredible explanation for his possession of the tires. We conclude the one-time reference to 52 prior reports, to which the defense arguably opened the door, was harmless even if erroneously admitted. MCL 769.26; *Lukity*, 460 Mich at 495-496.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens